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January 28, 2011

Delta Stewardship Council Members
P. Joseph Grindstaff, Executive Officer
650 Capitol Mall, Fifth Floor
Sacramento, CA 95814

VIA E-MAIL

Comments to Delta Stewardship Council – Notice of Preparation Draft Environmental Impact Report for the Delta Plan

Dear Council Members and Mr. Grindstaff:

The San Joaquin County Board of Supervisors, and the San Joaquin County Flood Control and Water Conservation District (collectively hereinafter "County of San Joaquin" or "County") would like to thank you for the opportunity to submit comments on the Delta Stewardship Council's Notice of Preparation Draft Environmental Impact Report for the Delta Plan dated December 10, 2010 (NOP).

Nearly half of the legal Delta is located within the County of San Joaquin, and the County is an interested stakeholder in the future viability of the Delta. We are very concerned about the Delta Plan which is being developed and its potential future impacts on the County. Based on the limited information available as set forth in the NOP, the County submits the following comments:

Project Description within NOP is Inadequate

The NOP for the Delta Plan in and of itself is inadequate. The California Environmental Quality Act (CEQA) requires that the NOP provide "sufficient information describing the project and the potential environmental effects to enable the responsible agencies to make a meaningful response." *CEQA Guidelines* § 15802. This section requires that at a minimum the NOP include a project description, the location of the project, and the probable environmental affects of the project. The NOP identifies various statutes that will drive the formulation of the Delta Plan as the project; however, the content, parameters and description of the Plan is unknown. There is no Delta Plan to review. There is currently only an interim plan and white papers describing various aspects of interest in the Delta. A central focus of the Delta Plan will be the Bay Delta Conservation Plan (BDCP) which is not yet completed as well as many other state-sponsored planning activities. These plans will provide vital input to the Delta Plan. The BDCP is still in its planning stages and the parameters of the BDCP have not yet been identified. Therefore, the project may not be adequately described in the NOP as required by California Environmental Quality Act.

Inadequate and Inconsistent Project Objectives

The County is concerned that the objectives of the Delta Plan as stated in the NOP are inadequate and inconsistent. A central issue to the proper management of the Delta, the Delta Plan must address how the interpretation of the coequal goals under the Delta Reform Act will coincide with meeting existing water right, watershed and area of origin protections. To reiterate from comments provided on the 1st Draft Interim Plan, a vast number of water users within the Delta beneficially use water pursuant to legally established riparian and/or overlying rights, and pre-1914 rights, which are among the most senior of water rights in the State, and are duly protected from the State and Federal Project export operations which are based on junior appropriative and subordinate contract water rights.

Delta Plan Must Rely on Best Available Science

The NOP has included references to the flawed Delta Risk Management Study (DRMS) which failed to pass a peer-review process and should not be relied upon as part of the Delta Plan. For example, in the review of the DRMS Phase I Technical Memoranda (TM) by the US Army Corp of Engineers (May 2007) Reviewer Goettel referred to the Section on Climate Change on page 19 as follows: c. On page 13, the TM summarizes four possible mean sea level rises for 2100, ranging from 20 cm to 140 cm (8 to 56 inch.), and note: The state of the science does not allow quantitative estimates of the probabilities of these different projections. Even subjective, semi-quantitative probabilities cannot be reliably assigned. The underlined statement above is the most important reference to the state-of-climate change science and any confidence in the magnitude of sea level rise and the resulting impacts on the Delta.

To preclude the Delta Plan from the potential of incorporating flawed and unsustainable policy principles concerning climate change, the Council must rely on a fair, unbiased best-available science approach in its evaluation of predictions of global warming impacts and sea level rise on the future Delta.

Delta Plan Must Resolve Conflict between Coequality of Goals

The conflict in the coequality of goals hinges on the fact that the reality of equality does not exist as written into current statute. In fact, reference is given to a letter dated 18 August 2009 in which Antonio Rossman, Lecturer of Water Resources Law, (Boalt Hall), University of California, Berkeley wrote in regard to then SB1, "the bill seeks to maintain the Blue Ribbon Task Force policy of pursuing environmental protection and supply reliability as "co-equal goals." Conforming that aspiration to both legal and ecological mandates requires refinement of the Blue Ribbon policy. The California Supreme Court's latest definition of the State's Bay-Delta responsibilities clearly provides that "water exports from the Bay-Delta ultimately must be subordinated to environmental considerations." (*In re Bay-Delta Programmatic EIR Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1168). He continued, "Stated differently, the goal of securing a reliable supply must in the end be realized by meeting the paramount needs of the environment." In the development of plans centered on the coequal goals, the Council should provide additional guidance on how the Delta Plan will address this yet unresolved conflict of coequal goals and also how the Plan will abide by established laws designed to protect the Delta.

Delta Plan Must Abide by Historic Delta Water Rights Law

A vast number of water users within the Delta beneficially use water pursuant to riparian and/or overlying rights, and pre-1914 rights, which are among the most senior of water rights in the State, and are duly protected from the Projects' export operations which are based on *junior* appropriative water rights. California water law is based on the priority system of state water rights. Shortages are addressed by implementation of the water right priority system. The most senior water rights are protected while junior water rights suffer. Competing demands for water in and from the Bay-Delta are properly resolved by applying the priority system, not by "balancing." If there is insufficient water in a stream system to support all appropriators, then diversions diminish starting with the most junior appropriators. (*Pleasant Valley Canal Company v. Borrer* (1998) 61 Cal.App.4th 742, 770.) The Delta Plan must recognize that shortages of water within the Bay-Delta are resolved by applying the priority system of water rights and other California water laws, such as the Delta Protection Statute (*Wat. Code* §§ 12200 et seq.), the Watershed Protection Statute (*Wat. Code* §§ 11460 et seq.) and the Area of Origin Statute (*Wat. Code* §§ 10500 et seq.).

In addition, the Watershed Protection Act (*Wat. Code*, § 11460, et seq.) and the Delta Protection Act (*Wat. Code*, § 12200, et seq.) impose fundamental limitations on the State Water Project (SWP) and federal Central Valley Project's ("Projects") ability to transfer "surplus" water from the Delta watershed to water-deficient areas to the south and west of the Delta. These acts contain the core protections and assurances including the Delta "common pool doctrine", which the Legislature afforded such water users when the Projects were initially authorized, that the Projects will indeed be limited to the transfer of water that is truly surplus to their needs. Situated within the Delta watershed, and with a substantial portion of its lands within the boundaries of the "legal Delta" (see *Wat. Code*, § 12220), the proper interpretation of these acts is of paramount importance to the County of San Joaquin and its many water users, both human and environmental, that depend on water from that watershed.

Discharge of Water Quality Standards should be a Required Action under the Delta Plan

The enforcement of existing laws and water quality standards is a short term action that can be implemented immediately under the Delta Plan. Through the Fish and Game Code, California Water Code and other laws and decisions, both the California Department of Fish and Game and the State Board have existing enforcement authorities to address various code and standard violations in the Delta. For example, under Decision D-1641, the responsibility to meet the Delta salinity objectives is summarized as follows: "Salinity problems in the southern Delta result from low flows in the San Joaquin River and discharges of saline drainage water to the river. The actions of the Central Valley Project (CVP) are the principal causes of the salinity concentrations exceeding the objectives at Vernalis." (D-1641 p. 89)

D-1641 continues stating that the circulation problems in the Delta are caused by "...export pumping by the SWP and CVP and in-Delta diversions in the southern Delta [which] cause null zones, areas with little or no circulation." Although the State Water Resources Control Board (SWRCB) found that in-Delta users contribute in part to the southern Delta salinity, based on substantial evidence it was reasonable to place the entire burden and obligation to meet the southern Delta salinity objectives on Department of Water Resources (DWR) and US Bureau of Reclamation (USBR). Thus, since 2000, it was made quite clear by the SWRCB that more needs

to be done by DWR and USBR to address the salinity problems in the southern Delta as D 1641 imposes. The Delta Plan should contain measures that require the discharge and compliance with existing standards that protect Delta water quality.

Delta Plan must define "...protects and enhances... the Delta as an evolving place"

With 2/3rds of the Delta in San Joaquin County any far-reaching changes to the Delta may seriously impact the way of life for area communities. In the County of San Joaquin alone, agricultural production reached an all-time high of over \$2 billion in 2007. Furthermore, the County's location within the Delta enables the County to serve as a major shipping point for many of the agricultural and manufactured products of Northern California and is home to the State's first inland seaport located in the City of Stockton. Since the mid-nineteenth century, Stockton is the region's transportation hub.

Despite the realization that the Delta ecosystem and its species are currently in decline, exports from the Delta have risen dramatically since the SWP began deliveries in 1971. It would seem that the promise made to protect the Delta has been over looked in favor of increased exports to the south. An isolated conveyance facility or peripheral canal/tunnel will do nothing to fix the supply-demand imbalance in the Delta, it merely transfers the shortage from one area to another. Historically, water engineers knew that in dry years, there was not going to be enough water to support export levels and keep the promise to the Delta. An isolated facility will also lead inexorably to the abandonment and destruction of the Delta and its vast array of infrastructure, its urban areas, its agriculture, and its ecosystem. It is recommended that the Delta Plan should provide more guidance and meaning of the following statement, "that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place."

Inadequate Water Supply for Delta Needs to be Resolved in Plan

The force behind the current water conflict is demand greater than supply. When arid lands are developed or put under irrigation a totally new demand for water is created. The amount of arid land remaining in California that can potentially be developed if water is available far outstrips even the most optimistic possibility of potential supply.

The current water supply crises is primarily due to the failure of the SWP to develop various projects on North Coast Rivers to annually supplement the water supply in the Delta with 5 million acre feet of water (DWR Bulletin No. 76 Preliminary Edition Report to the California Legislature on the Delta Water Facilities dated December 1960). In this plan, water sources and uses were developed to meet demands by the year 2000 wherein the entire 5 million acre feet of water from North Coast Projects was to be required. Wild and Scenic River legislation, increased environmental concerns, and cost of water development appear to be factors which discouraged construction of the North Coast Projects. It is important to recognize that for the year 2000 when due to the lack of North Coast water development it was expected that there would be no water for delivery by the SWP, the Water Education Foundation Layperson's Guide to the SWP (updated 2008) reports: "SWP delivers 3.5 million acre-feet of water, highest total since project began operations." The continuing shortage of SWP water supply and the cost to SWP contractors of replacing the North Coast supply create a tremendous incentive for exporters to simply take water otherwise needed within the San Francisco Bay-Delta Estuary for

environmental protection and consumptive use. It is reasonable to assume that the present efforts of directly attacking Northern California water diversions, increasing restrictions on discharges and reducing environmental protections and water quality standards will intensify due to the lack of overall water supplies to meet the necessary demands. The Delta Plan must include the analysis of what water is truly surplus to the Delta's needs and what is available for export.

Salinity Control Must be Key Component of Delta Plan

The Delta is an essential part of the San Francisco Bay-Delta Estuary. To avoid the detrimental impacts of salinity in the Delta, the CVP and SWP were planned to release stored water for salinity control. California Water Code Section 11207 added by Statutes of 1943 specified "Salinity control in the Sacramento-San Joaquin Delta" as one of the primary purposes of Shasta Dam. Salinity control is currently achieved by allowing unregulated river flow supplemented by releases of water from upstream reservoirs to flow into and out of the Delta in sufficient quantities to constitute a hydraulic barrier to Bay salinity. Upstream diversions to areas outside the watershed and the lack of a drainage solution for the hundreds of thousands of acres of irrigated land and wetlands along the west side of the San Joaquin Valley are the principal causes of the poor San Joaquin River water quality. The need for a solution to drain saline water emanating from water applied to the west side of the San Joaquin Valley has long been recognized. Salinity control is a key element in protecting Delta water quality. Salinity intrusion from the Bay is a major contributor to water quality degradation adversely affecting all beneficial uses of Delta water. The Delta Plan must address this issue and incorporate protections for adequate outflow and use.

Delta Plan Must Include the Consideration of All Project Alternatives that Reduce Demand on the Delta and Improve Regional Self Sufficiency

The County is aware that the current water conveyance alternatives do not include a comprehensive analysis of all project alternatives that may reduce demands on the Delta and improve regional self-sufficiency. This can be achieved through a host of water resources strategies developed throughout the State and not solely within the Delta or with reliance on increased diversions from Northern California. One such example is the Delta Corridors plan which has been presented by the South Delta Water Agency and the Central Delta Water Agency based in part on work performed by Dr. Russ T. Brown, Jones & Stokes. This proposal was presented to the Delta Vision process. It seeks to reconnect the San Joaquin River with the Bay. This proposal should have significant effects to fisheries while maintaining water quality supply and quality within the Delta. The environmental document for the Delta Plan must include meaningful analyses of all alternatives that will reduce demands for increased diversions from the Delta.

Additional Comments:

Page 18, lines 16 – 18 states: *"Agricultural water conservation requirements that expand upon objectives under SBX7 7, such as strategies to include all technically feasible efficient management practices."*

Agricultural water conservation requirements under SBX7 7 are already aggressive, and do not need to be expanded upon. However, if this statement is kept, it is recommended that the

statement be changed to: "...strategies to include all technically and economically feasible efficient management practices."

Page 18, lines 32 – 33 states: *"Prompt implementation of the BDCP program if the program complies with Water Code section 85320."*

This statement (or a similar statement), is included in most of the six implementation strategies described in the NOP. We need to know what the BDCP program is before including it as an implementation strategy. Therefore, it is recommended that the statement be deleted from the NOP.

Page 23, lines 24 – 27 states: *"A rigorous data collection system that is available for all agencies to use that will identify surface water and groundwater characteristics; diversion patterns; volume and patterns of water use by all urban, agricultural, business, and industrial users; discharge patterns; and compliance with regulations and environmental commitments of a range of projects."*

A "rigorous data collection system" will likely be extremely intrusive on Delta's agriculture, negatively impacting their water and property rights. Will Delta farmers be required to obtain individual National Pollutant Discharge Elimination System permits to provide water quality data to the Delta Stewardship Council? The County is seriously concerned that agriculture will ultimately shoulder the burden for funding this very costly "rigorous data collection system."

Page 23, lines 33 – 34 states: *"Consider expanding in practice and/or legislation the ability to use eminent domain procedures to further policy objectives of the Act."*

Eminent domain for ecosystem restoration should not be considered. Such a practice/legislation would have dire consequences that could go far beyond the boundaries of the Delta.

Page 24, lines 1 – 4 states: *"Consider a financing plan that could be based upon fees and charges to fund implementation of the Delta Plan recommendations and Delta Stewardship Council activities, in accordance with Proposition 26 adopted in November 2010 by the California voters."*

A finance plan for implementing the Delta Plan must recognize that public and private interests should contribute in proportion to the benefits received or negative impacts caused by the Plan, the need to mitigate the adverse impacts to local governments, and must provide funding for this mitigation. Any fee mechanism provided for in the Delta Plan must be based on engineering studies and other relevant and validated studies showing cost, benefit, impacts, etc. The process for developing a financing plan within the Delta Plan should be an open, and transparent public process.

Pages 23 – 24, Establish Governance and Financing Plans

Recommend an open and transparent governance which seeks and values input from the public and stakeholders before developing, implementing, and evaluating the elements of the plan.

Page 24, lines 35 – 36 states: *"Agricultural: The EIR will evaluate potential effects on agricultural land"*

Recommend this statement be changed to "The EIR will evaluate potential effects on agricultural land, practice, and economy"

Page 26, lines 17 – 23 states: *"Economics: The EIR will evaluate potential changes in land use, infrastructure, environmental resources, and risk potential to determine the economic or social effects that may cause environmental changes, such as changes based on a wide variety of factors, and consistent with CEQA, including availability of affordable water supplies, viable communities with projected land use and employment changes that can provide affordable public services, and utility and transportation corridors that facilitate reliable and affordable commerce."*

This statement is unclear. The economic impacts to agriculture, local government, and the entire Delta region need to be evaluated. It is not clear that this section provides for such an evaluation.

The San Joaquin County Board of Supervisors urges the Delta Stewardship Council (DSC) to take these comments into consideration as the Delta planning process moves forward. It is further recommended that the Council works collaboratively with local government and landowners as the Plan is being developed.

Thank you for your attention to this critical matter for San Joaquin County. We look forward to working with you, and submitting additional comments to the DSC in the future. If you have any questions regarding this matter, please contact Tom Gau, Interim Public Works Director at (209) 468-3101.

Sincerely,



Frank L. Ruhstaller, Chairman
San Joaquin County Board of Supervisors

c: San Joaquin County State Delegation
Paul Yoder, State Advocate
Karen Lange, State Advocate
Delta Counties Coalition
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